A **MICHAEL PHILIP SPEARS v. KETUA PENGARAH PENJARA KAJANG & ANOR AND ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
ABANG ISKANDAR JCA
VARGHESE GEORGE JCA
B NALLINI PATHMANATHAN JCA
[CIVIL APPEALS NO: W-01(IM)(NCVC)-268-07-2014 &
W-01(IM)(NCVC)-415-10-2014]
18 NOVEMBER 2016

C ***CIVIL PROCEDURE:*** *Striking out – Action – Accused person detained more than 17 years and on death row for 14 years – Accused sought declaration that detention was inhumane, cruel and/or degrading punishment – Whether suit ought to be summarily struck out – Whether accused had arguable and sustainable case*

D ***CIVIL PROCEDURE:*** *Jurisdiction – High Court – Accused person detained more than 17 years and on death row for 14 years – Accused sought declaration that detention was inhumane, cruel and/or degrading punishment – Whether High Court seized with jurisdiction to determine issues raised*

CONSTITUTIONAL LAW: *Fundamental liberties – Detention – Accused person*
E *detained more than 17 years and on death row for 14 years – Whether detention null and void – Whether detention in violation of accused's personal liberties – Federal Constitution, art. 5(1)*

The appellant was arrested in 1997 on the charge of murder and convicted for the same charge and sentenced to death by the High Court in 2000. The
F appellant's appeal to the Court of Appeal and the Federal Court proved futile. The Pardons Board further turned down the appellant's plea for clemency. The hanging of the appellant was scheduled by the prison authorities in 2014 but was called off just prior to that. By that time, the appellant had been in detention for more than 17 years and on death row for
G some 14 years. The appellant filed a suit at the High Court seeking, *inter alia*, declarations that (i) his prolonged, inordinate and inexcusable detention since 1997 was inhumane, cruel and/or degrading punishment; (ii) his detention was null and void; (iii) he be released from custody of the respondents; and (iv) the sentence to be hanged until death be set aside and/or quashed ('the suit'). Within the suit, (i) the appellant applied for a stay pending
H disposal of the suit of the death sentence ('encl. 4'); while (ii) the respondents applied for the striking out of the suit pursuant to O. 18 r. 19(1)(a), (b) or (d) of the Rules of Court 2012 or the inherent powers of the court ('encl. 8'). The High Court Judge held that the court had no powers or jurisdiction to grant any of the relief sought by the appellant and proceeded to dismiss
I encl. 4 and allowed encl. 8. Hence, the present appeals. The appellant

submitted that (i) his prolonged detention was in violation of his personal liberties guaranteed by art. 5(1) of the Federal Constitution ('the Constitution'); and (ii) he had been diagnosed to be of unsound mind and the trend in common law countries and international customary law was to prohibit the carrying out of a death sentence on an insane person.

Held (allowing appeals; reinstating and remitting suit back to High Court for full trial)
Per Varghese George JCA delivering the judgment of the court:

(1) To succeed on their application to strike out the suit, it was incumbent for the respondents to show that the appellant's case was plainly and obviously unsustainable. Conversely, the appellant would only have to establish that there was an arguable case. (para 30)

(2) The essence of the challenge mounted in the suit was not against the criminal process; the death sentence passed by the court; and/or the decision of the Pardons Board. The complaint was in respect of the delay in carrying out the death sentence imposed on the appellant, the inhumane and degrading treatment that he had to undergo over 16 odd years after conviction and more materially, the mental state and condition that he was in presently. The rights of a prisoner languishing on death row did not end with the affirmation of the death sentence by the Federal Court or by rejection of the Pardons Board of the appellant's plea for clemency. Being on death row did not extinguish the appellant's constitutional rights or remove from the court the jurisdiction to at least consider the remedy or relief applied for in the suit. (para 31)

(3) The court was, clearly and definitely, seized with the needful jurisdiction to judicially determine the issues raised by the appellant in the suit. The appellant was not precluded from advancing or building up his case as set out in the suit for appropriate intervention by the courts. The circumstances under which art. 5 of the Constitution could be availed for assistance of an aggrieved person was not shut and it was well within the powers of the court to give flesh to those abstract statements in concrete life situations as they emerge, as in this case. It was open to the court to consider all relevant issues and allow or dismiss the appellant's complaint. (paras 33-34)

(4) The appellant was suffering from a serious mental disorder, as evinced by the medical report. He was diagnosed with schizophrenia in 2004. Therefore, there was a sufficiently plausible and arguable case made out by the appellant and on that account, the appellant should not have been summarily denied the right to be heard fully on the suit. (paras 39-40)

A ***Bahasa Malaysia*** *Headnotes*

Perayu ditahan pada tahun 1997 atas pertuduhan membunuh dan disabitkan atas pertuduhan sama dan dijatuhkan hukuman mati oleh Mahkamah Tinggi pada 2000. Rayuan perayu di Mahkamah Rayuan dan Mahkamah Persekutuan ditolak. Ini diikuti oleh penolakan Lembaga Pengampunan
B terhadap rayuan belas kasihan perayu. Hukuman gantung perayu dijadualkan oleh pihak berkuasa penjara pada 2014 tetapi dibatalkan sebelum itu. Pada masa itu, perayu telah ditahan selama lebih 17 tahun dan berada di dalam penjara maut selama 14 tahun. Perayu memfailkan guaman di Mahkamah Tinggi, memohon, antara lain, pengisytiharan agar (i) penahanannya sejak
C 1997 yang berpanjangan, terlampau dan tidak boleh dimaafkan adalah satu hukuman yang tidak berperikemanusiaan, kejam dan/atau menjatuhkan maruah; (ii) penahanannya tidak sah dan terbatal; (iii) dia dilepaskan daripada tahanan responden-responden; dan (iv) hukuman gantung sampai mati diketepikan dan/atau dibatalkan ('guaman'). Dalam guaman tersebut,
D (i) perayu memohon penggantungan hukuman matinya hingga selesai guaman ('lampiran 4'); manakala (ii) responden-responden memohon pembatalan guaman di bawah A. 18 k. 19(1)(a), (b) atau (d) Kaedah-Kaedah Mahkamah 2012 atau kuasa-kuasa inheren mahkamah ('lampiran 8'). Hakim Mahkamah Tinggi memutuskan bahawa mahkamah tidak mempunyai kuasa atau bidang
E kuasa membenarkan relif yang dipohon oleh perayu dan seterusnya menolak lampiran 4 dan membenarkan lampiran 8. Maka timbul rayuan-rayuan ini. Perayu menghujahkan bahawa (i) kelengahan penahanannya mencabuli kebebasan dirinya yang terjamin oleh per. 5(1) Perlembagaan Persekutuan ('Perlembagaan'); dan (ii) dia didiagnos tidak sempurna akal dan arah aliran negara-negara common law dan undang-undang adat antarabangsa melarang
F pelaksanaan hukuman mati terhadap orang tidak siuman.

Diputuskan (membenarkan rayuan-rayuan; menghidupkan semula dan mengembalikan guaman ke Mahkamah Tinggi bagi perbicaraan penuh) Oleh Varghese George HMR menyampaikan penghakiman mahkamah:

G **(1)** Untuk berjaya dalam permohonan membatalkan guaman, responden-responden wajib menunjukkan bahawa kes perayu jelas tidak boleh dipertikaikan. Sebaliknya, perayu hanya perlu membuktikan wujud kes untuk dipertikaikan.

(2) Intipati cabaran guaman bukan terhadap proses jenayah atau hukuman
H mati yang dijatuhkan oleh mahkamah dan/atau keputusan Lembaga Pengampunan. Aduan adalah berkenaan kelengahan melaksanakan hukuman mati yang dijatuhkan atas perayu, layanan tidak berperikemanusiaan dan menjatuhkan maruah yang dilaluinya selama kira-kira 16 tahun selepas sabitan dan yang paling penting, keadaan mental perayu kini.
I Hak-hak banduan yang berada di dalam penjara maut tidak berakhir dengan pengesahan hukuman mati oleh Mahkamah Persekutuan atau

penolakan rayuan belas kasihan perayu oleh Lembaga Pengampunan. Berada di dalam penjara maut tidak melenyapkan hak-hak keperlembagaan perayu atau menjadikan mahkamah tidak berbidang kuasa untuk, paling tidak, mempertimbangkan remedi atau relif yang dipohon dalam guaman.

(3) Mahkamah, jelas dan ternyata, mempunyai bidang kuasa memutuskan isu-isu yang dibangkitkan oleh perayu dalam guaman. Perayu tidak terhalang daripada mengemukakan atau menghujahkan kesnya seperti yang dinyatakan dalam guaman bagi campur tangan wajar mahkamah. Hal-hal keadaan yang membolehkan per. 5 Perlembagaan membantu orang yang terkilan tidak tertutup dan mahkamah berkuasa menghidupkan kenyataan-kenyataan abstrak tersebut dalam situasi konkrit kehidupan apabila perlu, seperti dalam kes ini. Terbuka untuk mahkamah mempertimbangkan kesemua isu-isu relevan dan membenarkan atau menolak aduan perayu.

(4) Berdasarkan keterangan laporan perubatan, perayu mengalami penyakit mental yang serius. Dia telah didiagnoskan dengan penyakit skizofrenia pada 2004. Oleh itu, terdapat kes yang cukup munasabah dan boleh dipertikaikan yang dibuktikan oleh perayu dan atas sebab itu, perayu tidak sepatutnya dinafikan terus akan hak untuk dibicarakan penuh dalam guaman.

Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor [1983] 1 CLJ 278; [1983] CLJ (Rep) 92 FC ***(refd)***

Jabar v. PP [1995] 1 SLR 61 ***(refd)***

Lee Kwan Woh v. PP [2009] 5 CLJ 631 FC ***(refd)***

Navneet Kaur v. State of NCT Delhi & Anr [2014] 7 SCC 264 ***(refd)***

Ong Ah Chuan v. PP [1981] AC 648 ***(refd)***

Pratt v. AG of Jamaica [1994] 2 AC 1 ***(refd)***

Shatrughan Chauhan & Anr v. Union of India & Ors [2014] 3 SCC 1 ***(refd)***

Sher Singh v. State of Punjab AIR 1983 SC 465 ***(refd)***

Triveniben & Ors v. State of Gujarat & Ors [1992] LRC (Const) ***(refd)***

Legislation referred to:

Criminal Procedure Code, s. 281(b)(ii)

Federal Constitution, arts. 5(1), 42

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (d)

Federal Constitution [Ind], art. 21

Jamaican Constitution, s. 17(1)

For the appellant - Abdul Rashid Ismail & Azreen Ahmad Rastom; M/s Rashid Zulkifli For the respondent - Alice Loke Yee Ching & Andi Razalijaya A Dadi; SFCs

[Editor's note: Appeal from High Court, Kuala Lumpur; Suit No: 21NCVC-34-06-2014 (set aside).]

Reported by Najib Tamby

JUDGMENT

Varghese George JCA:

Introduction

[1] There were two interrelated appeals before us. The appellant, the plaintiff in Civil Suit 21NCVC-35-06-2014 (the suit), was the appellant in both the appeals. The appeals were against decisions given in respect of two interlocutory applications brought within the suit.

[2] Appeal No. W-01(IM)(NCVC)-268-07-2014 was against the decision of the High Court which had dismissed the appellant's application *vide* encl. 4 for a stay pending disposal of the suit, of the sentence of death by hanging handed down on 13 June 2000 against the appellant.

[3] Appeal No. W-01(IM)(NCVC)-415-10-2014 was against the High Court's decision which allowed the respondent's application *vide* encl. 8 brought under O. 18 r. 19(1)(a), (b) or (d) Rules of Court 2012 or the inherent powers of the court, to strike out the suit.

Background

[4] The appellant together with two others had been arrested on 20 February 1997 and subsequently arraigned on charges for murder. On 13 June 2000 the High Court had convicted all the three accused and sentenced them to death.

[5] The accused appealed to the Court of Appeal. On 21 May 2003 the Court of Appeal dismissed the appellant's and one other accused's appeal, while allowing the appeal of the one other.

[6] The Federal Court on 1 August 2008 dismissed the appellant's and the other accused's appeal and affirmed the death sentence ordered against them.

[7] The Pardons Board also had turned down the appellant's plea for clemency on 30 July 2013 and the prison authorities were duly informed of the said decision on 29 November 2013.

[8] The hanging of the appellant had been scheduled for 14 March 2014 by the prison authorities but was called off just prior to that. The reasons or at whose instance it was called off were not disclosed.

[9] The suit was filed on 11 June 2014. By that time the appellant had been in detention for more than 17 years (since1997) and on the death row (in solitary confinement) for some 14 years.

[10] By way of the suit the appellant sought the following relief (para. 18 of the statement of claim):

(i) Declaration that the prolonged, inordinate and inexcusable detention of the Plaintiff since 20/2/1997 is inhuman, cruel and/or degrading punishment;

(ii) Declaration that the continued detention of the Plaintiff is null and void and bad in law;

(iii) That the sentence to hang until death of the Plaintiff be set aside and/or quashed;

(iv) In the alternative, that the execution of the sentence to hang until death of the Plaintiff by the Defendants be quashed and/or set aside;

(v) Declaration that the Plaintiff be forthwith released from custody of the 1st and 2nd Defendants;

(vi) That there be no order as to costs; and

(vii) Further or other orders that this Honourable Court deems fit.

[11] Enclosure 4 (High Court) was the appellant's application for an interim stay to prevent the authorities from carrying out the appellant's hanging until full disposal of the suit. This was dismissed by the High Court on 9 July 2014.

[12] Enclosure 8 (High Court), the application of the respondents to strike out the suit, as earlier noted, was allowed by the High Court on 15 September 2014.

[13] Before us on 13 April 2015 we allowed encl. 8(a) (Court of Appeal), an application of the appellant to amend the memorandum of appeal. The learned Senior Federal Counsel for the respondent had no objections to the same.

[14] On 28 August 2015, the appellant had withdrawn their encl. 7(a) (Court of Appeal) application for discovery of further documents by the respondents after the learned Senior Federal Counsel had confirmed that all relevant medical records were already in the rekod rayuan and on the learned Senior Federal Counsel's confirmation given to the court on 13 April 2015 that the respondents would concede that the appellant had been mentally affected as a result of his incarceration and further the appellant had a serious mental disorder that had been diagnosed to be 'schizophrenia'.

[15] Also on 28 August 2016 we allowed the appellant's encl. 13(a) (Court of Appeal) application, upon being informed that the respondents had no objections thereto, namely, to adduce the medical record of the appellant dated 6 December 2004 from Hospital Bahagia, Ulu Kinta, as additional evidence in respect of the appeals before us.

Appeal W-01(IM)(NCVC)-415-10-2014

[16] It was our decision that this appeal against the substantive application to strike out the suit, be dealt with first. The sole issue for determination here was whether in law or on the facts, it had been shown that the matters raised or the relief sought by the appellant in the suit were plainly and obviously unsustainable.

[17] As evident from the grounds of judgment the learned judge at the High Court approached that issue principally from the perspective of whether the court had any further jurisdiction to entertain and consider the remedies prayed for in the suit after the criminal trial had been concluded and all avenues of appeal had been exhausted, even on the grounds advanced by the appellant that there had been a delay in carrying out or executing the sentence ordered by the court. The learned judge held that the court had no such further powers or jurisdictions to grant any of the relief sought by the appellant in the suit.

[18] The learned judge relied on various decided authorities that had upheld the principle that the courts were *'functus officio'* after completion of the judicial process. Her Ladyship agreed with submissions of the Senior Federal Counsel that once a sentence had been handed down and all appeals exhausted, it lay solely within the prerogative of the Ruler of a State and/or Pardons Board whether to grant reprieves and respites by reduction of the sentence (or otherwise), even if it was to be on the grounds that there had been any delay by the authorities in executing the death sentence imposed/affirmed by the courts. The court also referred to art. 42 of the Federal Constitution and provisions of s. 281 of the Criminal Procedure Code, particularly s. 281(b)(ii) thereof in that regard.

[19] To be fair to the learned judge, the decision that it was no longer within the powers of the court to order a stay of execution or grant a respite of the sentence was made in the context of the principal ground relied upon by the appellant's then counsel at the High Court, namely, that there had been a delay in carrying out the hanging order and the appellant had been detained in solitary confinement for the inordinate period of over 14 years. Such detention, it had been argued, amounted to inhumane treatment and a violation of the rights enshrined in art. 5 of the Federal Constitution, which a prisoner was also entitled to.

[20] Before us, there was however a slight shift in the emphasis of submissions for the appellant. It was argued that judicial intervention was warranted as per the relief sought in the suit not merely on grounds of delay in carrying out the hanging but this was to be coupled with the further consideration that the appellant was presently afflicted with a serious mental disorder. It was submitted that the appellant was entitled to the protection of the law even at this stage and in that context the suit did not amount to a challenge on the substantive death sentence that had been imposed at the close of the criminal trial process.

[21] The learned judge in allowing the suit to be struck out had essentially relied on the decision of the Singapore Court of Appeal in *Jabar v. PP* [1995] 1 SLR 61. In that case there had been a delay of five years in the disposal of a petition for clemency and a declaration was sought that it would be cruel and inhuman to carry out a death sentence (similar as in our case). The application for a declaration was dismissed by the High Court and this was affirmed by the Court of Appeal.

[22] However the reasoning of the court in refusing intervention in *Jabar (supra)*, as could be gleaned were that:

(a) The principle derived from the Privy Council decision in *Pratt v. AG of Jamaica* [1994] 2 AC 1 was not applicable as there was no equivalent s. 17(1) of the Jamaican Constitution prohibiting 'inhuman or degrading treatment', in the Constitution of Singapore.

(b) The Indian authorities on the subject were not helpful as there was material difference between Indian and Singapore criminal procedure in respect of the passing of a death sentence; in India death sentence (limited to six offence) was not mandatory or conclusive and had to be confirmed by the High Court sitting in appeal to the sentencing court (usually the Sessions Court);

(c) Once a sentence was passed, the judicial process was concluded and the court was '*functus officio*'; and

(d) The power of commutation or remittance of sentence lay only with the President and the **plea for clemency was still pending**; and

(e) Anguish and mental agony suffered whilst awaiting execution was an inevitable consequence and did not amount to a contravention of the constitutional rights of the prisoner.

[23] Senior Federal Counsel's submissions before the court below could be summarised as follows:

(a) All due process available to the appellant had been exhausted with the dismissal of the appeal by the Federal Court (*Jabar* (*supra*));

(b) To set aside the sentence of death and order a release of the appellant would amount to a 'pardon' and the court could not intervene in this exercise of the Royal prerogative of mercy under art. 42 of the Federal Constitution (*Chiow Thiam Guan & Ors v. Superintendent of Pudu Prison & Anor* [1983] 1 CLJ 278; [1983] CLJ (Rep) 92; [1983] 2 MLJ 116);

(c) In any event, the plea for clemency had also been refused by the Pardons Board;

(d) The delay in executing the death sentence was not an infringement of any constitutional right (*Jabar* (*supra*));

(e) The matters complained of and the relief sought by the appellant were therefore non-justiciable and the case was wholly unsustainable.

[24] It could therefore be seen that the learned judge was not called upon to consider at all or in detail the further factor of the appellant's current mental status in coming to the decision to allow the striking out of the suit and the submissions of the learned SFC was also in the main restricted to the point that delay in carrying out the death sentence was not sufficient to justify the court's further intervention in the matter.

[25] The submission of counsel for the appellant before us, as we discerned it, was basically two fold. Firstly, it was contended that art. 5(1) of the Federal Constitution – "No person shall be deprived of his life ... save in accordance with the law" – if interpreted generously and liberally (as it should be) would encompass humanitarian consideration and the appellant's prolonged detention (even after the Pardons Board had refused his plea for clemency almost six years) should be held to violate the appellant's constitutionally guaranteed personal liberties; 'law' there, it was contended, would encompass 'procedural fairness' as well. (*Lee Kwan Woh v. PP* [2009] 5 CLJ 631; [2009] 5 MLJ 301; *Ong Ah Chuan v. PP* [1981] AC 648).

[26] Secondly, apart from the delay in the execution of the death sentence, in this case the appellant had been diagnosed to be of unsound mind and the trend in common law countries including India, and further under international customary law, was to prohibit the carrying out of a death sentence on an 'insane person'. (Indian Supreme Court cases *Shatrughan Chauhan & Anr v. Union of India & Ors* [2014] 3 SCC 1; *Navneet Kaur v. State of NCT Delhi & Anr* [2014] 7 SCC 264).

Our Deliberation And Decision

[27] It needs to be noted that the mental condition of the appellant as being 'virtually insane and of unsound mind' was included in the pleadings at paras. 9 and 10 of the statement of claim. It was as follows:

> 9. Due to the prolonged detention, especially after dismissal of the appeal by the Federal Court on 01.08.2008, the Plaintiff who had been in solitary confinement in bilik akhir since conviction by the High Court on 13/6/2000 which is for a period of nearly 14 years.

> The Plaintiff has suffered extreme mental distress due to the solitary confinement for about 23 hours per day. As a result of the prolonged solitary confinement in the death cell (bilik akhir), the Plaintiff has suffered from psychiatric and mental problems and has become virtually insane and of unsound mind. The Plaintiff has been undergoing psychiatric and mental problems at the hospital at the Kajang Prison and is still under treatment.
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> 10. The Plaintiff avers that his detention since 20/2/1997 as a remand prisoner, initially at the Sungai Buloh Prison and since about 13/6/2000 in the death cell (bilik akhir) at the Kajang Prison had adversely affected his mental condition and health.

[28] The amended memorandum of appeal presented this ground now being forcefully relied upon by the appellant, in the following manner:

> Ground 2: Executing An Individual Suffering From Mental Disorder is Unconstitutional
>
> [43] The Appellant above named, having filed the Memorandum of Appeal to the Court of Appeal on 03.12.2014, appeals on the additional ground that the execution of the Appellant, who suffers from mental disorder, is unconstitutional.
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> ...
>
> Execution Of Those Suffering From Serious Mental Disorder Is A Deprivation Of Life That Is Not In Accordance With The Law.

[29] Further, prayer (iv) at para. 18 of the statement of claim spelt out that among the relief sought *inter alia* was:

> (iv) In the alternative, that the **execution of the sentence** to hang until death of the Plaintiff be quashed and/or **set aside**;

Hence the appellant's pleading had also sought, *albeit* alternatively, for the execution of the sentence to be set aside.

[30] As earlier noted, in order to succeed on their application to strike out the suit; it was incumbent upon the respondent to show that the appellant's case was plainly and obviously unsustainable. Conversely, the appellant would only have to establish that there was an 'arguable case' available to them. As instructively noted in *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7:

> **It is only in plain and obvious cases that recourse should be had to the summary process** under this rule ... can only be adopted when it can be clearly seen that a claim or answer is on the face of it 'obviously unsustainable' ... . **It cannot be exercised by a minute examination of the documents and facts of the case**, in order to see whether the party has a cause of action or defence ... . The court must be satisfied that there is no reasonable cause of action or that the claim was frivolous or vexatious or that the defence raised are not arguable.

[31] We agreed with counsel for the appellant that the essence of the challenge mounted in the suit was not against the criminal process or the death sentence passed by the court and/or the decision of the Pardons Board. We were of the further view, that the complaint here was in respect of and directly arising from the delay in carrying out the death sentence imposed on the appellant, the inhumane and degrading treatment that he had to undergo over 16 odd years after conviction **and more materially,** the mental state and condition that he was in presently. This was all about the treatment and rights of a prisoner languishing on death row; such rights definitely did not end with the affirmation of the death sentence by the Federal Court (*Triveniben & Ors v. State of Gujarat & Ors* [1992] LRC (Const)) or by the rejection by the Pardons Board of the appellant's plea for clemency. In other words, being on the death row did not extinguish the appellant's constitutional rights or remove from the court jurisdiction to at least consider the remedy or relief applied for in the suit.

[32] The Federal Court in *Lee Kwan Woh (supra)* has succinctly stated how the courts should act when called to interpret provisions of the Federal Constitution dealing with fundamental liberties generally, and art. 5 thereof in particular. They include the following passages and we have taken the liberty to highlight the salient observations relevant for our consideration in this case.

> [8] In the second place, the Constitution is a document *sui generis* governed by interpretive principles of its own. In the forefront of these is the principle that its provisions should be interpreted generously and liberally. On no account should a literal construction be placed on its language, particularly upon those provisions that guarantee to individuals the protection of fundamental rights. In our view, it is the duty of a court to adopt a prismatic approach when interpreting the fundamental rights guaranteed under Part II of the Constitution. When light passes through a prism it reveals its constituent colours. In the same way, the prismatic interpretive approach will reveal to the court the rights submerged in the concepts employed by the several provisions under Part II. Indeed the prismatic interpretation of the Constitution gives life to abstract concepts such as 'life' and 'personal liberty' in art. 5(1). There are several authorities in support of this view. ...
>
> [9] The next case is *Boyce v. The Queen* [2004] UKPC 32, where Lord Hoffman said:
>
> > Parts of the Constitution, and in particular the fundamental rights provisions of chapter III, are expressed in general and abstract terms which invite the participation of the judiciary in giving them sufficient flesh to answer concrete questions. The framers of the Constitution would have been aware that they were invoking concepts of liberty such as free speech, fair trials and freedom from cruel punishments which went back to the enlightenment and beyond, And they would have been aware

> that sometimes the practical expression of these concepts what limits on free speech are acceptable, what counts as a fair trial, what is a cruel punishment had been different in the past and might again be different in the future. But whether they entertained these thoughts or not, the terms in which these provisions of the Constitution are expressed necessarily co-opts future generations of judges to the enterprise of giving life to the abstract statements of fundamental rights.
>
> ...
>
> ...
>
> [12] The third principle is this. A court when interpreting the other provisions of our Constitution, in particular, those appearing in Part II thereof, must do so in the light of what has been correctly referred to as 'the humanising and all pervading provisions of art 8(1). …

[33] It was clear therefore that the appellant was not precluded in advancing or of building up their case as set out in the suit for appropriate intervention by the courts. The circumstances under which art. 5 of the Federal Constitution could be availed of for the assistance of an aggrieved person was not shut, (as affirmed by the Federal Court in *Lee Kwan Woh*'s *(supra)*, and it was well within the powers of the court to give 'flesh' to those abstract statements in concrete life situations as they emerge, like for instance in this fact scenario where there has been a delay in the carrying out of the death sentence coupled with the appellant's adverse mental condition. The pleadings filed, as shown above, also sufficiently adverted to the relevant facts and the nature of the relief prayed for by the appellant. It was open to the courts to consider all relevant issues and allow or dismiss the appellant's complaint.

[34] We were of the view that the court was therefore clearly and definitely seized with the needful jurisdiction to judicially determine the issues raised by the appellant in the suit.

[35] On the question of whether the contentions of the appellant had any arguable basis or foundation, suffice for us to refer to certain pertinent observations of the Supreme Court of India in the *Shatrughan Chauhan (supra).* That case revolved around the reach of art. 21 of the Indian Constitution, which was in the following terms:

> Article 21. No person will be deprived of his life and liberty except in accordance with procedure established by law.

Our equipollent art. 5(1) of our Federal Constitution is worded in the following manner:

> (1) No person shall be deprived of his life or personal liberty save in accordance with law.

[36] Passages from the judgment in *Shatrughan Chauhan (supra)* which in our view had relevance and force in our context too, are produced hereunder:

> [71] In this batch of cases, two convict prisoners prayed for commutation of death sentence into sentence of life imprisonment on the ground that the unconscionably long delay in deciding the mercy petition has caused *the onset of chronic psychotic illness, and in view of this the execution of death sentence will be inhuman and against the well-established canons of human rights.*
>
> [72] *The principal question raised in those petitions is whether because of the aforementioned supervening events after the verdict of this Court confirming the death sentence, the infliction of the most extreme penalty in the circumstances of the case, violates the fundamental rights under Article 21. The petitioners have made it clear that they are not challenging the death sentence imposed by this Court. However, as on date, they are suffering from insanity/mental illness.* In this background, let us consider whether the petitioners have made out a case for commutation to life sentence on the ground of insanity.
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> [73] India is a member of the United Nations and has ratified the International Covenant on Civil and Political Rights (ICCPR). *A large number of United Nations international documents prohibit the execution of death sentence on an insane person.* Clause 3(e) of the Resolution 2000/65 dated 27.04.2000 of the U.N. Commission on Human Rights titled "The Question of Death Penalty" urges "all State that still maintain the death penalty...not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.
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> ...
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> (e) *Not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person.*
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> ...
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> [74] Similarly, Clause 89 of the Report of the Special Rapporteur or Extra-Judicial Summary or Arbitrary Executions published on 24.12.1996 by the *UN Commission on Human Rights* under the caption "Restrictions on the *use of death penalty" states that "the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited*". Further, Clause 116 thereof under the caption "Capital punishment" urges that "Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards".
>
> ....
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> ....

[78] The above materials, particularly, *the directions of the United National International Conventions, of which India is a party, clearly show that insanity/mental illness/schizophrenia is a crucial supervening circumstance, which should be considered by this Court in deciding whether in the facts and circumstances of the case death sentence could be commuted to life imprisonment.* To put it clear, "insanity" is a relevant supervening factor for consideration by this Court.

....

[37] The decision in *Shatrughan Chauhan (supra)* was followed in *Navneet Kaur*'s *(supra)*. Further in *Triveniben & Ors (supra)* it was noted:

> Since it is well established that Article 21 of the Constitution does not end with the pronouncement of sentence but extends to the stage of execution of that sentence, as already asserted, prolonged delay in execution of sentence has a dehumanising effect on the accused.

Also in *Sher Singh v. State of Punjab* AIR 1983 SC 465 the Supreme Court of India through Chandrachud CJ held:

> The horizons of Art 21 are ever widening and the final word on its conspectus shall never have been said. So long as life lasts, so long shall it be the duty and endeavour of this Court to give to the provisions of our Constitution a meaning which will prevent human suffering and degradation. Therefore, Art 21 is as much relevant at the stage execution of the death sentence as it is in the interregnum between the imposition of that sentence and its execution. The essence of the matter is that all procedure, no matter at what the stage, must be fair, just and reasonable.

[38] Counsel for the appellant had referred to us a number of authorities of similar purport from various jurisdictions but the above observations of the apex court of India in cases where a convicted person was in somewhat similarly circumstanced situation as the appellant is presently, most definitely demonstrate that the contentions of and relief sought by the appellant in the suit were not outright bare and/or frivolous and/or devoid of any arguable jurisprudential basis. It might well be that some of those cases referred may be distinguishable on the facts or on account of the applicable law or procedure involved, or even that the international conventions or customary law cited found not to be relevant for our consideration in the suit, but the appellant ought to, in our view, be allowed to fully ventilate and have those issues judicially determined. As commented in *Bandar Builder (supra)*, "... so long as the pleadings disclose some cause of action or raise some questions fit to be decided by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out ...".

A **[39]** The fact that the appellant was suffering from a serious mental disorder was conceded by the learned Senior Federal Counsel. The fresh evidence adduced, namely the Medical Board of the appellant from Hospital Bahagia, Ulu Kinta evidenced the further fact that the appellant had been diagnosed with 'schizophrenia' even as early as or about 6 December 2004.

B **[40]** There was therefore, in our assessment, a sufficiently plausible and arguable case made out by the appellant and on that account the appellant should not have been summarily denied the right to be heard fully on his suit, as was done here when the respondents' application to strike out the action was allowed by the court below.

C **Conclusion**

[41] As discussed and elaborated above, we were satisfied that the issues raised in the suit were justiciable in that the court had the necessary jurisdiction to deal with the suit, and that the appellant had sufficiently shown an arguable case to have the suit ordered to proceed to trial.

D

[42] Accordingly it was our decision that the suit be reinstated and remitted back to the High Court for full trial.

[43] With respect to Appeal No. W-01(IM)(NCVC)-287-07-2014 it followed that the appeal therein ought to also be allowed and an order in terms of prayer (2) of encl. 4 (High Court) be granted to the appellant. We so ordered.

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[44] No order was made as to costs. The deposits were ordered to be refunded to the appellant.

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